No. 75-362

Supreme Court, U. S.
FILED
DEC 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

PATRICIA ANN CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals improperly refused to consider the merits of her appeal of a district court order revoking her probation; and that by granting the government's motion to vacate the order and remanding the case to the district court for a second revocation hearing, the court of appeals placed her twice in jeopardy in violation of her Fifth Ammendment rights.

In July, 1973, following a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing with intent to distribute marihuana, in violation of 21 U.S.C. 841(a)(1). Imposition of sentence was suspended and petitioner was placed on probation for four years on condition, *inter alia,* that she "completely disassociate herself from persons who have ever been involved in any phase of the drug culture" (Pet. App. C). Petitioner did not appeal her conviction.

In November, 1974, petitioner was arrested in Fort Worth, Texas, and charged with possession of marihuana. When arrested, petitioner allegedly was in a house occupied by three individuals, all of whom had criminal records for drug related offenses (Pet. App. E). Accordingly, the United States Probation Officer in Corpus Christi, Texas, petitioned the court to revoke petitioner's probation on the ground that she had violated a condition of her probation (*ibid.*). A hearing was held in Corpus Christi, at which petitioner was represented by counsel. However, the probation officer who had had direct responsibility for supervising petitioner and who had reported the alleged violations of the condition of her probation did not attend the hearing.[1] Following the hearing, the district court revoked petitioner's probation and sentenced petitioner to confinement under the Youth Corrections Act, 18 U.S.C. 5010(b), until discharged pursuant to 18 U.S.C. 5017(c) (Pet. App. D).

Petitioner appealed the revocation of her parole on the ground, *inter alia*, that she had been denied due process of law because she had not been given the opportunity to confront her supervising probation officer, whose reports formed the basis of the allegations against her. In response, the government conceded the correctness of petitioner's contention and accordingly moved to vacate the district court's order and remand the case for a second hearing at which petitioner would have an opportunity to cross examine her supervising probation officer. Petitioner opposed the government's motion to vacate on the ground that denial of her right to confront the probation officer and other alleged procedural errors at the revocation hearing had rendered the government's evidence insufficient to support the district court's order and that, therefore, her probation should be reinstated. The court of appeals vacated and remanded (Pet. App. A).

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[1]Petitioner was originally arrested and convicted in the Corpus Christi Division of the Southern District of Texas. Because she resided in Fort Worth, Texas, however, she was assigned to a supervising probation officer from the United States Probation Office in Fort Worth.

Petitioner contends that the court of appeals improperly refused to consider the merits of her appeal of the district court's probation revocation order. However, the court of appeals acted well within its discretion in deciding to vacate and remand; it was not necessary under these circumstances to go on to consider the merits of petitioner's appeal, which the court subsequently will have full opportunity to consider should the government prevail on remand.

Contrary to petitioner's further contention, a second probation revocation hearing would not place her twice in jeopardy in violation of the Fifth Amendment. A criminal defendant whose conviction is vacated on appeal is not placed twice in jeopardy if he is tried a second time on remand to the district court. *Forman* v. *United States*, 361 U.S. 416, 425-426; *Sapir* v. *United States*, 348 U.S. 373; *Bryan* v. *United States*, 338 U.S. 552.[2] In any event, jeopardy does not attach at a probation revocation hearing since the hearing does not determine guilt, and is not a stage of a criminal prosecution. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[2]Petitioner cites six cases (Pet. 7) in which the United States Court of Appeals for the Fifth Circuit refused to remand for retrial following reversal of criminal convictions on appeal. In each case, however, the decision not to remand was based on factual circumstances unrelated to the question whether remand would place the defendant twice in jeopardy. These decisions do not, therefore, support petitioner's argument that the Double Jeopardy Clause bars a retrial upon reversal and remand.

DOJ-1975-12